UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

GRIFFIN SERVICES, INC.

Employer[1]

and **Case 10-RC-15355**

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1922

Petitioner[2]

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Griffin Services Inc., is a Georgia corporation with offices and places of business located at the United States Army's Fort Stewart and Hunter Army Airfield military bases near Savannah, Georgia, where it is engaged in the business of facility management and base support services for the Department of Defense. The Petitioner, American Federation Of Government Employees, Local 1922, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit, stipulated to by the parties, of approximately 211 employees.

A hearing officer of the Board held a hearing and the parties filed briefs with me, which have been carefully considered. The sole issue in this case is the Employer's contention that Petitioner has a conflict of interest that precludes it from serving as the bargaining representative

[1] The Employer's name appears as amended at hearing.

[2] The Petitioner's name appears as amended at hearing.

of the Employer's employees. I have considered the evidence and arguments presented by the parties on this issue. As discussed below, I have concluded that Petitioner's representation of the Employer's employees does not constitute a "clear and present danger" to the collective bargaining process. Thus, I do not find that Petitioner is disqualified from representing the Employer's employees, and I will direct an election in the stipulated unit.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.[3]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[4]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. As noted above, I find that the Employer has failed to meet its heavy burden of demonstrating a clear and present danger of a conflict of interest by the Petitioner in its proposed representation of the stipulated unit of employees. To provide a context for my discussion of this

[3] At the hearing, the Employer moved to dismiss the petition. For the reasons discussed herein, I hereby deny the Employer's motion to dismiss.

[4] The parties stipulated that during the past calendar year, a representative period, the Employer purchased and received supplies and materials, at its facilities located at Fort Stewart and Hunter Army Airfield military bases near Savannah, Georgia, valued in excess of $50,000 directly from suppliers located outside the State of Georgia.

issue, I will first present the background facts. Then, I will present the parties' respective positions and the facts, legal analysis and reasoning that support my conclusions.[5]

Background Facts

The Employer is a private corporation providing facility management and base support services for the United States Department of Defense. In the year 2000, the Employer was awarded a contract for the performance of maintenance services at the United States Army's Fort Stewart and Hunter Army Air Field military bases located near Savannah, Georgia. The maintenance services to be provided under the contract included trades related to heating, plumbing, air conditioning, carpentry, supply functions, recycling, and refuse functions. Before the outsourcing of this contract to the Employer, these services were performed by federal government civil service employees who were represented by Petitioner. Petitioner filed a protest of this award that was denied. The civil service employees displaced by the outsourcing award were given a first right of refusal and some of them are currently employed with the Employer.

The Parties' Respective Positions

The Employer objects to Petitioner as the potential collective bargaining representative of its employees on the grounds that Petitioner has a conflict of interest with the employees it seeks to represent. In the Employer's view, Petitioner's opposition to outsourcing work to private contractors, its contention that private contractor employees are inferior to civil service employees, its support of legislation seeking to reverse work already outsourced, and its protest of the award to the Employer lead to the inevitable conclusion that that Petitioner has a strong conflict of interest. Petitioner submits that

[5] In addition to the rationale discussed herein, I have also taken notice of my previous Decision and Direction of Election in Case 10-RC-15258 involving the same parties, which issued on January 10, 2002. In fact, Petitioner submitted the same brief in the instant case that it submitted in Case 10-RC-15258. In my previous Decision, I concluded that the Employer had not met its evidentiary burden of establishing that Petitioner had a disqualifying conflict of interest to warrant dismissal of the petition.

the Employer has failed to meet its heavy burden of demonstrating a clear and present danger of a conflict of interest.

In support of its position, at the hearing in the instant proceeding, the Employer presented some of the same exhibits and similar testimony to that presented at the hearing in Case 10-RC-15258. [6] Specifically, the various exhibits and testimony at both hearings demonstrated that the Petitioner, as a matter of policy, is opposed to the practice of privatization. The Employer points to the Preamble of Petitioner's 1978 Constitution and Bylaws, which state that Petitioner adopts the document "for the purpose of promoting unity of action in all matters affecting the mutual interest of government civilian employees" and Article II, Section 1, which states that its objective is "to promote the general welfare of civilian governmental employees."[7]

The Employer also relies upon an article written by an officer of Petitioner and published in 2001 in two local newspapers. Petitioner was critical of the government's contracting out of certain operational functions to private sector companies. The article also asserted that certain jobs "can only be done by the federal government and federal employees . . ." and stated that federal employees should not be replaced by "untrained, underpaid, transient contracted workers."

As further evidence of Petitioner's strong opposition to the outsourcing of work to private contractors, the Employer cites the national union's campaign known as 'SWAMP," an acronym for Stop Wasting America's Money on Privatization. On its internet website, the national union asserts that

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[6] In its post-hearing brief in the instant proceeding, the Employer asserts that since the 2002 Decision issued in Case 10-RC-15258, Petitioner has further manifested a conflict of interest and bolstered its opposition to the outsourcing of work to private contractors through legislation and lawsuits that it fueled and supported, by greater dissemination of anti-contractor propaganda and by more public demonstrations. I am not persuaded by this argument. It would undermine the collective bargaining process to conclude that a conflict of interest exists merely because Petitioner pursues lawful legislative and regulatory reform outside the process.

[7] At page 8 of Petitioner's post-hearing brief in Case 10-RC-15258, which it resubmitted in the instant case, Petitioner asserts that its 1978 Preamble is outdated and the current Preamble to the National Constitution provides that the National Constitution and Rules were adopted "[f]or the purpose of promoting unity in action in all matters affecting the mutual interests of government civilian employees in general, **all other employees providing their personal service indirectly to the United States Government** and for the improvement of government service . . ." (emphasis in original).

its SWAMP campaign "aims to prevent agencies from contracting out our work to politically connected businesses who rake-in billions of dollars in sure-fire profits from Uncle Sam" and notes that "[d]irect conversions are the worst threat."[8] It urges support of the TRAC Act (Truthfulness, Responsibility, and Accountability in Contracting Act)(H.R. 721 & S 1152), which promotes "contracting in" by requiring agencies to track contractor costs and to subject contractors' work to public-private competition when the contractor fails to meet certain performance standards. In sum, the Employer argues that Petitioner is motivated by the interests of civil service employees and not by the private contractor employees it seeks to represent. In the Employer's view, Petitioner cannot represent the stipulated unit "with undivided loyalty when it is directly seeking their elimination through the 'contracting in' initiatives" discussed above. Besides Petitioner's divided loyalties, the Employer contends there is a clear and present danger of poisoning the collective bargaining process if Petitioner is permitted to represent the unit. For example, the Employer argues, Petitioner could demand exaggerated wages and benefits and cost overruns would affect the Employer's ability to maintain the contract. Finally, the Employer asserts that Petitioner made no effort at the hearing to rebut the Employer's arguments that Petitioner presented a conflict of interest.

Contrary to the Employer, Petitioner contends that the Employer presented the same witness at the hearing and rehashes the same arguments that were found to be unpersuasive and lacking in merit in Case 10-RC-15258. In its brief, Petitioner renews its argument that the alleged clear and present danger of interference with the bargaining process is speculative. Petitioner argues that there is no legal precedent suggesting that a union who has sought to resist contracting out of its employees is thereby disqualified from following the work and representing those employees. Petitioner also renews its assertion that the local union's newspaper article and the national union's website materials criticizing contracting out are arguments advanced both generally as a union primarily representing federal

[8] Direct conversions refer to work performed by civil service employees converted to private contractors.

employees and as matters in the public interest pursuant to the protected rights of federal employees to criticize and petition Congress concerning widespread abuses of contracting out. Petitioner contends that the TRAC Act legislative proposals have the support of all unions, and adoption of the Employer's theory would necessitate disqualification of all unions. Such criticism of waste and inefficiency, the Petitioner argues, "are the regular grist of any union campaign against practices of management."

Legal Analysis and Conclusions

It is well settled that a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized. Bausch & Lomb Optical, 108 NLRB 1555 (1954). To find that a union has a disabling conflict of interest, the Board requires a showing of a "clear and present" danger interfering with the bargaining process. The burden on the employer seeking to prove this is a "heavy one" because of the strong public policy favoring the free choice of a bargaining agent by employees. Garrison Nursing Home, 293 NLRB 122 (1989).

In Bausch & Lomb Optical, supra, the Board found that, based on the "unique" facts of that case, the employer met its "considerable burden" of proving that a conflict of interest existed because the union actually owned and controlled a business enterprise in the same industry and locality as the employer, in direct competition with the employer. The Board found that there was an "innate danger" that the union would be tempted to bargain with the employer based, not on the interests of the employees it represented, but rather on the interests of the competing business.

The unique facts of Bausch & Lomb Optical, where a union is in direct business competition with the employer whose employees it represents, is a far cry from that present here. In this case, the Petitioner does not control or dominate any enterprise that competes with, or is a customer of, the Employer. Rather, the Employer contends that the conflict arises because

Petitioner seeks to represent employees "who are the exact same private sector employees [Petitioner] actively promotes as unqualified, incompetent, wasteful and likely terrorists" while "simultaneously pursuing legislation in Congress to prevent, halt and even reverse the award of contracts to employees of private contractors, such as [the petitioned-for unit], on behalf of and to protect the interests of 600,000 dues-paying civil service employee members."

I reject the Employer's contention that the instant case presents a conflict of interest similar to that found by the Board in Catalytic Industrial Maintenance Co., 209 NLRB 641 (1974). I find the instant case to be distinguishable. In Catalytic Industrial, the Board found a conflict of interest where the union represented employees of both the employer and its subcontractor. The Board emphasized that the union had committed an "overt act" showing that it was working at cross purposes with its duty to represent the subcontractor's employees and thus presenting a proximate danger of infecting the bargaining process. Consequently, the Board granted the employer's motion to revoke the union's certification, because the union, which represented employees performing maintenance work under a subcontract with another company, Oxochem, had sought in negotiations with Oxochem to eliminate the subcontracting of the work and to transfer the employer's bargaining unit employees to Oxochem. Thus, the Board found that the union was seeking, not only the rescission of the subcontract, but also the dissolution of the employer's bargaining unit. Id. at 646. Such is not the case here.

While the Employer is correct that a conflict of interest may exist even in the absence of an overt act, the national union's campaign to end the practice of contracting out may or may not be successful. Moreover, since it is in the interest of the parties to a collective bargaining relationship that the employer remains in business, it is not clear that a successful SWAMP campaign would affect the Employer's ability to maintain the contract. At the time the union in Catalytic Industrial committed the "overt act" seeking the elimination of all bargaining unit jobs,

it was the certified representatives of the employees. Here, by contrast, the Petitioner has not been certified as the bargaining representative of the Employer's employees. Therefore, any suggestion that Petitioner cannot represent the best interests of the employees herein is merely speculative.

Finally, the Board has held that employees are in the best position to decide if representation by a union will serve their interests, and they can make that decision by casting their ballots for or against the Petitioner in a representation election. See, Sierra Vista Hospital, Inc., 241 NLRB 631, 633 (l979), citing NLRB v. David Buttrick Co., 399 F.2nd 505, 507 (1st Cir. 1968).[9] Accordingly, I find that any alleged conflict of interest in this case is speculative and does not present a "clear and present" danger. The contention that Petitioner might undermine the bargaining process post- certification is far too speculative to warrant disqualifying it from seeking to represent the stipulated unit. See, Alanis Airport Services, 316 NLRB 1233 (l995). The Board will not deprive employees of their right to select their collective bargaining representative based on speculation or conjecture.[10]

6. The parties stipulated and I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> Including all full-time and part-time employees at the Employer's Fort Stewart and Hunter Army Air Field locations employed as refuse employees of roads and grounds, Sanitation section employees, Energy plant section employees, Electric section employees, Key section employees, Carpenter section employees, Heavy equipment employees, Heavy equipment mechanics employees, Mobile equipment services employees, Auto workers employees, motor vehicle mechanics employees, Truck driver employees, Scale operator employees, Boiler plant operator employees, Laborer employees, Work leader employees, Phone operator employees, Supply personnel employees, Office clerk employees, Water

[9] Should Petitioner become the certified representative and an actual conflict of interest arises, the Employer may raise that issue at that time through appropriate procedures under the Act.

[10] National Food Stores of Louisiana, 186 NLRB 127, 128 (1970) ("Hypothesis and speculation are not a sufficient foundation upon which to erect a barrier against the Petitioner.").

treatment employees, Electrical employees, Air conditioning employees, Steam fitters employees, Kitchen equipment employees, Plumbers employees, Pest control employees, QA employees, and other similar situated employees.
Excluding confidential employees, professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by American Federation Of Government Employees, Local 1922. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for

collective bargaining purposes by the American Federation Of Government Employees, Local 1922.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established. To be timely filed, the list must be received in the Regional Office, 233 Peachtree Street, NE, Harris Tower, Suite 1000, Atlanta, Georgia 30303 on or before March 14, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (404) 331-2858**.**

Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estopps employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, NW, Washington, DC 20570.

This request for review must be received by the Board in Washington by 5:00 p.m. EST on March 21, 2003.

Dated at Atlanta, Georgia, this 7th day of March 2003.

/s/ Martin M. Arlook
Martin M. Arlook, Regional Director
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